

# Kasell Law Firm

February 23, 2024

Hon. Diane Gujarati  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: *Meged Funding Group Corp. v. Varaluz LLC et al.*, 24 Civ. 00863

Judge Gujarati:

I am counsel for Defendants in the above-captioned action. Pursuant to Part III of this Court's Individual Rules, I write to request a pre-motion conference prior to filing a motion to strike the letter submitted today under ECF No. 9 by counsel for Plaintiff.

The Court's Individual Rules state:

Pre-motion conferences are not required in bankruptcy appeals, social security appeals, habeas corpus/prisoner petition cases, or cases in which one or more parties are proceeding pro se. ***In all other cases***, a party must request a pre-motion conference with the Court before filing any motion pursuant to Fed. R. Civ. P. 12 or 56, or before filing a Daubert motion.

<https://www.nyed.uscourts.gov/pub/rules/DG-MLR.pdf> (emphasis added).

There is perhaps some ambiguity in the Individual Rules because after stating "[i]n all other cases," it says "Fed. R. Civ. P. 12 or 56, or before filing a Daubert motion." *Id.* A motion to remand is not filed under Rule 12 or 56 of the Federal Rules of Civil Procedure. Nor is a motion to strike.

Nonetheless, we believe a pre-motion conference is warranted here despite any ambiguity in the Individual Rules because the letter that Plaintiff's Counsel submits as a motion violates Rule 7.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Rules"). Rule 7.1 requires:

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- (1) A notice of motion, or an order to show cause signed by the Court, which shall specify the applicable rules or statutes pursuant to which the motion is brought, and shall specify the relief sought by the motion;
- (2) A memorandum of law, setting forth the cases and other authorities relied upon in support of the motion, and divided, under appropriate headings, into as many parts as there are issues to be determined; and
- (3) Supporting affidavits and exhibits thereto containing any factual information and portions of the record necessary for the decision of the motion.

Plaintiff's letter completely fails to comply with this requirement including a memorandum of law, setting forth the cases and other authorities relied upon in support of the motion. The only exception to this Rule permitting motion letters involves "[a]pplications for extensions or adjournments, applications for a pre-motion conference, and similar non-dispositive matters . . . ." Local Rule 7.1(d). Plaintiff's "motion" for a remand is not similar to an application for an extension or adjournment.

"A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001). Nonetheless, Defendants submit that after reviewing the anticipated motion to strike, the Court will agree that it should not exercise its discretion to allow this letter to count as complying with Local Rule 7.1.

A memorandum of law by Plaintiff is particularly appropriate here because Plaintiff argues in his letter "Defendants merely state a damages figure of \$86,498.88 in their Notice of Removal. Plaintiff seeks only \$69,199.10 in contractual damages." ECF No. 9 at 2. But that's not true. Paragraph 13 of the Complaint filed in state court states: "There remains a balance due and owing to Plaintiff on the Agreement in the amount of \$86,498.88, plus interest from December 19, 2023, costs, disbursements and attorney's fees." ECF No. 5-1 (Complaint attached to Letter to Court pursuant to the Court's Order).

The "amount in controversy" exceeds \$75,000 (and is \$86,498.88 plus additional money) because, as Paragraph 9-10, allege:

9. Initially, Company Defendant met its obligation under the Agreement, however, on or about December 19, 2023, Company Defendant breached the Agreement by failing to perform its

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obligations under the terms of the Agreement, by blocking and depriving Plaintiff of its daily ACH withdrawals from the specified bank account all while still conducting regular business operations. Company Defendant has paid a total of \$58,215.90 to Plaintiff leaving a balance due and owing the amount of \$69,199.10.

10. In addition, pursuant to Section 31 of the Agreement, Company Defendant incurred a Default Fee in the amount of \$17,299.78 (which, upon the occurrence of an event of default, is calculated as twenty- five percent (25%) of the unpaid/remaining balance of the purchased amount of future receivables to be applied to the balance owed to Plaintiff) for Company Defendant's failure to direct the agreed upon payment(s) to Plaintiff and for Company Defendant changing its bank account from the specified bank account.

A memorandum of law will elucidate why Plaintiff believes that it can allege \$86,498.88 under these paragraphs but then argue it only seeks \$69,199.10 in contractual damages. Or perhaps in preparing its memorandum of law or for the pre-motion conference, Plaintiff's counsel will be convinced that the motion for remand should not be filed.

We understand that District Courts cannot "prevent a party from making a motion that it is entitled to bring under the Federal Rules of Civil Procedure." *Wechsler v. Hunt Health Sys., Ltd.*, 216 F. Supp. 2d 347, 351 n.3 (S.D.N.Y. 2002); *see also Eisemann v. Greene*, 204 F. 3d 393, 397 (2d Cir. 2000). But we respectfully request a pre-motion conference as the party's arguments about their anticipated motions may well convince Plaintiff to withdraw the "letter motion" and otherwise not file a motion to remand, and thus keep the Court from expending its otherwise limited judicial resources in resolving Plaintiff's so-called motion as well as Defendant's cross-motion to strike for violating the Local Rules.

Respectfully,

/s/ David Kasell

*Attorney for Defendants*